K Elizabeth Sumana De Silva v Amir Singh a/l Amrik Singh

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24 NCVC-2022–07 OF 2012
YEOH WEE SIAM J
8 APRIL 2013

Land Law — Possession — Recovery of — Summary proceeding for possession of land — Whether defendant raised bona fide issues of law or fact to defeat application — Whether defendant mere squatter/trespasser — Whether defendant could not challenge application by claiming he had spent monies on improving land — Whether such claim did not create right or interest in land — Rules of Court 2012 O 89

The instant summary proceeding for possession of land pursuant to O 89 of the Rules of Court 2012 was brought by the plaintiff in her capacity as executrix of the will of her deceased mother ('the deceased') who owned a parcel of land ('the land') occupied by the defendant. It was the plaintiff's case that the defendant came upon the land and remained in occupation without her, or the deceased's, permission. The defendant had built a concrete wall around the land and erected a tent on the land ('the illegal structures') and claimed that apart from spending money on those structures he had also incurred expenditure on improving the land. The defendant also contended that the land had been *gazetted* by the government as 'Green Land' and that although the authorities knew he was in occupation of the land they had not taken any action against him thereby implying that he had their implied consent to remain in occupation.

Held, allowing the application with costs:

(1) The defendant had failed to raise any bona fide issues of law and fact to defeat the plaintiff's application. It was clear from the evidence that the defendant was a squatter simpliciter or a mere trespasser and there were no merits in his case (see para 17).

(2) The defendant could not stake a claim to the land by implying consent being given to him by the federal government and the relevant authorities to remain on the land just because he had not been charged in court for illegal occupation. In the absence of proof of a *gazette* notification on compulsory acquisition of the land by the state authority any future plan to *gazette* the land as 'Green Land' would not at the present time defeat the indefeasible title of the registered owner, ie the deceased (see para 16(c)).

(3) The defendant failed to show any proof that he was given permission by

the deceased or the plaintiff to occupy and remain on the land and to construct the illegal structures (see para 16(b)).

(4) There was nothing to prevent the defendant from filing a separate action in personam for compensation for monies spent on the land if he had a reasonable cause of action against the plaintiff. However merely alleging that he was entitled to such compensation did not prove any right in rem to the land. The evidence showed the defendant did not have any legal right or interest in the land (see para 16(d)).

[Bahasa Malaysia summary

Prosiding ringkas ini untuk pemilikan tanah berikutan A 89 Kaedah-Kaedah Mahkamah 2012 dimasukkan oleh plaintif dalam kapasitinya sebagai wasi wasiat si mati ibu ('si mati') yang memiliki sebidang tanah ('tanah') yang dihuni oleh defendan. Adalah kes plaintif bahawa defendan terjumpa tanah tersebut dan tinggal menghuni di tanah tersebut tanpa keizinannya ataupun si mati. Defendan telah membina dinding konkrit mengelilingi tanah tersebut dan mendirikan khemah ke atas tanah tersebut ('struktur-struktur haram') dan mendakwa selain membelanjakan wang ke atas struktur-struktur tersebut dia juga menanggung perbelanjaan untuk membaikpulih tanah tersebut. Defendan juga berhujah bahawa tanah tersebut telah diwartakan oleh kerajaan sebagai 'Green Land' dan walaupun pihak-pihak berkuasa mengetahui dia menghuni tanah tersebut mereka tidak mengambil apa-apa tindakan terhadapnya dengan itu memberi implikasi yang dia mempunyai izin tersirat untuk tinggal menghuni.

Diputuskan, membenarkan permohonan dengan kos:

(1) Defendan telah gagal untuk membangkitkan apa-apa isu undang-undang dan fakta bona fide untuk mengagalkan permohonan plaintif. Adalah jelas daripada keterangan bahawa defendan adalah *squatter simpliciter* atau semata-mata penceroboh dan tidak terdapat merit dalam kesnya (lihat perenggan 17).

(2) Defendan tidak dapat mengisytiharkan tuntutan kepada tanah tersebut dengan izin tersirat yang diberikan kepadanya oleh kerajaan persekutuan dan pihak-pihak berkuasa relevan untuk kekal tinggal di tanah tersebut hanya kerana dia tidak didakwa di mahkamah untuk penghunian haram. Dalam ketiadaan bukti pemberitahuan *warta* atas pengambilan secara paksa tanah tersebut oleh pihak berkuasa negeri apa-apa perancangan masa depan untuk mewartakan tanah sebagai 'Green Land' tidak akan pada masa sekarang mengagalkan hak milik tak boleh sangkal pemilik berdaftar iaitu si mati (lihat perenggan 16(c)).

(3) Defendan gagal untuk menunjukkan apa-apa bukti bahawa diberi

keizinan oleh si mati atau plaintif untuk menghuni dan kekal di tanah dan untuk mendirikan struktur-struktur haram tersebut (lihat perenggan 16(b)).

(4) Tiada apa-apa yang dapat menghalang defendan daripada memfailkan tindakan berasingan in personam untuk pampasan bagi wang yang dibelanjakan ke atas tanah tersebut jika dia mempunyai kausa tindakan munasabah terhadap plaintif. Walau bagaimanapun dengan hanya mendakwa yang dia berhak kepada pampasan sedemikian tidak membuktikan apa-apa hak in rem ke atas tanah tersebut. Keterangan menunjukkan yang defendan tidak mempunyai apa-apa hak undang-undang atau kepentingan di dalam tanah tersebut (lihat perenggan 16(d)).]

Notes

For cases on recovery of, see 8(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4036–4051.

Cases referred to

Fullrise Resources Sdn Bhd v Ng Ah Toh & Anor [2004] MLJU 187, HC (refd)
Teh Beh v K Maruthamuthu [1997] 2 MLJ 7, FC (refd)

Legislation referred to

National Land Code
Rules of Court 2012 O 89, O 89 rr 1, 2, 3

Leong Wai Hong (Foo Yen Ne with him) (Skrine) for the plaintiff.
Ragumaren Gopal (Kiran Kaur with him) (G Ragumaren & Co) for the defendant.

Yeoh Wee Siam J:

JUDGMENT (IN RESPECT OF THE ORIGINATING SUMMONS IN ENCL 1)

ENCLOSURE 1

[1] This is the originating summons filed by the plaintiff for the following reliefs:

(a) an order that the plaintiff does recover possession of the land held under *Geran No Hakmilik* 29891, Lot 36, Seksyen 94A, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur on the ground that the plaintiff is entitled to possession and that the defendant, Amir Singh a/l S Amrik Singh, who is in occupation of the land, is in occupation without licence or consent;

(b) an order that the defendant does give possession of the said land to the plaintiff within 14 days from the date of the order prayed for herein;

(c) costs; and

(d) such further or other relief as this honourable court deems fit and proper to be granted.

[2] Enclosure 1 was heard on the same day after the court had heard and allowed encl 23 ie the plaintiff's application to amend the heading of the originating summons to insert the words '(wasi bagi wasiat Phyllis De Alwis si mati)' after the plaintiff's name, to reflect that she is suing as the executor of the will of her deceased mother, Phyllis De Alwis ('the deceased').

BACKGROUND FACTS

[3] The plaintiff, vide the grant of probate dated 11 April 2011, is the executrix and administrator of the land which forms part of the estate of the deceased (exh A2 of the plaintiff's affidavit in support). The deceased was initially the registered owner of the land. She passed away on 22 November 2009.

[4] The defendant is currently occupying the land and he had constructed a concrete wall around the land and erected a tent on the land ('illegal structures') without the plaintiff's permission and consent.

[5] The plaintiff had vide a letter dated 7 June 2012 through her solicitors demanded the defendant to vacate the land and to demolish the illegal structures. The defendant has failed, refused and/or neglected to comply with the said letter.

COURTS DECISION GIVEN ON 1 MARCH 2013 REGARDING ENCL 1

[6] The plaintiff's application in the originating summons is allowed. Costs of RM5,000 are to be paid by the defendant to the plaintiff forthwith.

GROUNDS FOR THE COURT'S DECISION

Leave of the court not required

[7] Contrary to what counsel for the defendant submitted, I do not think that there is any requirement in the Rules of Court 2012 ('the ROC') that the plaintiff has to apply for leave of the court before the commencement of this action.

[8] Counsel for the defendant cited *17 Halsbury's Laws of England* (4th Ed), at para 1560 which states, 'it is advisable for a personal representative before bringing an action to obtain the consent of all the beneficiaries or to seek the court's direction'.

[9] *Halsbury's* only stated 'it is advisable' to seek the court's direction. It did not state that leave of the court must be obtained first before commencement of the action. In any case, leave of the court is not a mandatory requirement under the ROC. Therefore, the plaintiff does not have to apply for leave of the court first before commencing this action.

The procedural requirements have been complied with by the plaintiff

[10] This application for summary proceeding for possession of land is correctly made under O 89 of the ROC.

[11] Order 89 r 1 of the ROC provides:

> *Proceedings to be brought by originating summons (O.89, r.1)* Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) *who entered into or remained in occupation without his licence or consent* or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order. (Emphasis added.)

[12] Order 89 r 2 of the ROC provides:

> The originating summons shall be in Form 8A and *an acknowledgement of service is not required*. (Emphasis added.)

[13] Under O 89 r 3 of the ROC, the plaintiff is required to show the following facts:

(a) her interest in the land;

(b) the circumstances in which the land has been occupied without licence or consent and in which her claim to possession arises; and

(c) that she does not know the name of any person occupying the land who is not named in the summons.

[14] The plaintiff has complied with the requirements of O 89 r 3 of the ROC based on her affidavit evidence.

3. There are no triable issues raised by the defendant

[15] The principles governing an O 89 application have been clearly restated by Low Hop Bing J (as he then was) in *Fullrise Resources Sdn Bhd v Ng Ah Toh & Anor* [2004] MLJU 187:

> The Supreme Court in *Chiu Wing Wan*, through the judgment of Mohamed Azmi SCJ (as he then was) enunciated the following principles:
>
> (1) The summary procedure under O 89 should not be allowed to apply where the entry to the land in the first instance is lawful, for in such a situation, there must necessarily be the facts and the law for determination by evidence viva voce;
>
> (2) the summary procedure under O 89 is governed by the same principles as those under O 14;
>
> (3) to entitle a defendant to a trial, all the defendant needs to do is show that there is a triable issue of law or fact;
>
> (4) it is only in clear cases of trespass that a summary order can be made under O 89;
>
> (5) an application under O 89 should be dismissed if there are triable issues of fact and law, as such an application for vacant possession ought to have been commenced by writ; and
>
> (6) for the purpose of the summary procedure under O 89, a distinction should be made between squatters simpliciter who have no rights whatsoever and occupiers with licence or consent, as well as tenants and licensees holding over: *Bohari*, SC; *Immetec*, HC.

[16] The burden of proof is on the defendant to prove that he has the licence and consent of the owner of the land to occupy the land.

(a) I do not agree with the submission of counsel for the defendant that this originating summons should be converted into a writ action. The matter is rather straightforward and the facts regarding trespass by the defendant are very clear. I am of the view that the matter can be decided based on affidavit evidence without the necessity of going for a trial with viva voce evidence.

The deceased, being the registered owner of the land, had indefeasibility of title of the land under the Torrens System and the provisions of the National Land Code (see Federal Court case, *Teh Beh v K Maruthamuthu* [1997] 2 MLJ 7 at p 12);

(b) even though the plaintiff is currently not yet registered as the owner of the land, the plaintiff has been given the grant of probate of the deceased's estate. This means that she is vested with the full powers given under the grant of probate as an executrix to administer the estate of the deceased

which, by necessary implication, would include taking steps for recovery of the land from the defendant who had entered into and remained in occupation of the land, without the licence or consent of the deceased, and also without the licence or consent of the plaintiff after she was given the grant of probate over the land. The defendant has not produced any document or shown proof in any way that he was given permission by the deceased or the plaintiff to occupy and remain on the land and to construct the illegal structures;

(c) the defendant questioned the ownership of the plaintiff of the land. He claimed that this is disputed land and it belongs to the federal government and has been gazetted as 'Green Land' (para 2.2 of exh A8 of the defendant's affidavit in reply). The defendant alleged that he had the implied consent of the authorities to remain on the land.

According to the defendant, he had previously written a letter to Pejabat Tanah dan Galian Persekutuan ('PTG') for approval to merge both Lot 111 (which land belongs to the defendant) and Lot 36 ('the said disputed land') (exh A4 of the defendant's affidavit in reply).

The defendant contended that the authorities knew of the presence of the defendant on the said disputed land, and so far no action has been taken to charge him in court for illegally occupying the said disputed land by the federal government or the relevant authorities. The defendant therefore argued that he had lawful entry on the said disputed land vide the continuing implied consent by the federal government or the authorities to remain on the said disputed land.

In the absence of proof of a *gazette* notification on compulsory acquisition of the land by the state authority, I do not think that any proposed future plan by the federal government or the state authority to *gazette* the said disputed land as a 'Green land' would at this present point in time defeat the indefeasibility of title of the registered owner ie the deceased. As I had stated earlier in this judgment, although the plaintiff is not the registered owner of the land, pursuant to the grant of probate, the plaintiff has full legal rights to claim a beneficial and a legal interest to the land. This land belongs to the estate of the deceased and ought to be administered by the plaintiff as executrix. It is certainly not the said disputed land for which the defendant can stake a claim by implying consent being given by the federal government and the relevant authorities for him to remain on the land just because he has not been charged in court for illegal occupation of the land; and

(d) the defendant's main grievance is that he had spent large sums of money on improving the land, including the alleged illegal structures, and he wants to be compensated for such expenditure. That could be the subject matter of a monetary claim. There is nothing to prevent the defendant from filing a separate action in personam for such compensation if the defendant has a reasonable cause of action against the plaintiff. However,

by alleging that he is entitled to such compensation, it does not prove any right in rem to the land. The evidence shows that the defendant does not have any legal right or interest to the land.

[17] In conclusion, the court is satisfied that the defendant has failed to raise any bona fide triable issues of law and fact. From the evidence adduced, it is clear that the defendant is a squatter simpliciter, or a mere trespasser on the land. There are no merits to the defendant's case. Therefore, a summary order ought to be made under O 89 of the ROC in favour of the plaintiff.

[18] For the above reasons, I ordered accordingly.

Application allowed with costs.

Reported by Ashok Kumar